

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

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| NIX, et al. | Docket No. 7:17-CV-189-D |
| | Docket No. 7:17-CV-195-D |
| v. | Docket No. 7:17-CV-197-D |
| | Docket No. 7:17-CV-201-D |
| THE CHEMOURS COMPANY, | Docket No. 7:17-CV-209-D |
| FC, LLC, et al. | Docket No. 5:18-CV-73-D |

Raleigh, North Carolina
-- -- -- -- -- May 25, 2018

**TRANSCRIPT OF STATUS CONFERENCE
BEFORE HONORABLE JAMES C. DEVER III, CHIEF DISTRICT JUDGE,
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA**

APPEARANCES:

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| For the Plaintiffs: | Theodore Leopold, Esq. George House, Esq. Stephen Morrissey, Esq. Stephen Bunch, Esq. Stephen Johnston, Esq. |
| For the Defendants: | Kenneth Reilly, Esq. John Sherk, Esq. Mark Anstoetter, Esq. Stephen Feldman, Esq. Jonathan Sasser, Esq. |
| Court Reporter: | Harold M. Hagopian, RDR, CRR |

Proceedings recorded by mechanical stenography,
Transcript produced by computer-assisted transcription.

PROCEEDINGS

(The following proceedings were held in open court at the United States Courthouse, 310 New Bern Avenue, Raleigh, North Carolina, before the Honorable James C. Dever III, Chief District Judge for the Eastern District of North Carolina, on May 25, 2018, at 10:59 a.m.)

* * *

THE COURT: Good morning, and welcome to the United States District Court for the Eastern District of North Carolina. We're here today for a status conference in three cases only -- five cases, depending on the math.

So, why don't we just, for -- I recognize a lot of familiar faces, but we'll start with counsel for plaintiffs, and then we'll hear from counsel for defendants. If you'd just introduce yourself again.

MR. LEOPOLD. Thank you, your Honor. Good morning. Ted Leopold on behalf of the class plaintiffs.

THE COURT: Good morning, Mr. Leopold.

MR. HOUSE: Good morning, your Honor. George House, for the Brooks firm, on behalf of Cape Fear Public Utility Authority.

THE COURT: Good morning, Mr. House.

MR. MORRISEY: Good morning, your Honor. Stephen Morrissey, Susman Godfrey, for the class plaintiffs.

THE COURT: Good morning, Mr. Morrissey.

1 MR. BUNCH: Good morning, your Honor. Doug
2 Bunch from Milstein, also for the class plaintiffs.

3 THE COURT: Good morning, Mr. Bunch.

4 MR. REILLY: About a third done, your Honor.
5 Good morning. I'm Ken Reilly on behalf of Chemours and Du
6 Pont, your Honor.

7 THE COURT: Good morning. Good to have you
8 here.

9 MR. SHERK: Good morning, your Honor. John
10 Sherk, also on behalf of the defendants.

11 THE COURT: Good morning, Mr. Sherk.

12 MR. ANSTOETTER: Good morning. Mark Anstoetter
13 on behalf of the defendants.

14 THE COURT: Good morning.

15 MR. FELDMAN: Good morning, your Honor. Stephen
16 Feldman, Ellis & Winters, for the defendants.

17 THE COURT: Good morning, Mr. Feldman.

18 MR. SASSER: Good morning. Jonathan Sasser,
19 Ellis & Winters, for the defendants

20 THE COURT: Good morning, Mr. Sasser.

21 All right, there are a number of things to discuss,
22 but first I gather that there remains essentially an
23 impasse on the issue of expedited discovery. I don't know
24 if you wanted to add anything on that, Mr. Leopold, and
25 then I'll hear from Mr. House.

1 MR. LEOPOLD: Thank you, your Honor.

2 Not much more to add other than what's in our papers.
3 The parties had worked cooperatively for the first several
4 weeks and had come, I think, to a resolution where we were
5 at; and then, which is certainly appropriate, new counsel
6 came in. We seemed the have a little bit of a loggerhead
7 in terms of the last issue, which is us wanting to test for
8 the toxins that we believe are important to test.

9 And that's really the only -- my understanding, the
10 only last issue we have. And a secondary issue is that
11 they have -- they, meaning the defendants -- are insisting
12 on using their protocol for the testing. We, of course,
13 once we take the samples, want to use our protocol, which
14 is the EPA protocol, for the testing. And defendants can
15 test however they wish.

16 We also told them that we're willing to -- and we had
17 made this arrangement with them, an agreement -- to provide
18 them how we are doing the testing, what our protocols are,
19 and if they want to duplicate it, they are more than happy
20 to do so.

21 THE COURT: Okay.

22 MR. LEOPOLD: Oh, your Honor, excuse me. Just
23 one other issue that was not on the radar at the time of
24 our January hearing, which is now certainly on the radar --
25 and the Court may be aware of this -- the state has

1 interceded in terms of the air-pollution-related issue on
2 the smokestacks, and we also, while we're there on the
3 premises, wanted to do, with the appropriate protocol, the
4 smokestack testing, as well.

5 THE COURT: And what would that involve?

6 MR. LEOPOLD: That involves taking some air
7 samples, and, in terms of the type of testing, we have set
8 forth and provided to the defendants what that protocol
9 would be.

10 THE COURT: And is there -- is there -- but
11 there's not an agreement on that part?

12 MR. LEOPOLD: My understanding, at least at the
13 last time we had a discussion about that, since the
14 defendants have stated to us, since it was not teed up at
15 the January hearing --

16 THE COURT: Right.

17 MR. LEOPOLD: -- that this is a, quote, new
18 matter, that it's not on the protocol list, and, therefore,
19 they are objecting to us doing that.

20 THE COURT: All right. Mr. House?

21 MR. HOUSE: As Mr. Leopold said, we've asked for
22 a scope -- they asked us what we were going to test for. I
23 don't know that we reported to you the last time, your
24 Honor -- or we even agreed to tell them what we were going
25 to test for, because part of what we test for, we don't

1 know what we are testing for, as we explained. But we did,
2 in good faith, tried to give them everything that we knew
3 we were going to test for.

4 The authorities have a certain number of parameters
5 they have to test for in their water. So, what we'd do,
6 we'd just send them a copy of what we had to test for, and
7 said we'd like to test for these. They included some PFCs,
8 because we have very little in our current testing about
9 PFCs, other than now the GenX, the PFOAs and the PFOASs.
10 There are requirements to test for PFOA, a compound, and
11 to test now for GenX.

12 The other -- I want to get one subject first, then
13 come back to PFC compounds.

14 There is a list, a suite of things, that we test for
15 every day, including for any compounds of other substances,
16 that I would say that we don't have any reason to believe,
17 from the processes, they are there; but since we run the
18 same test every time since we've had some concern about the
19 thoroughness and/or the truthfulness of the testing that is
20 done by Chemours, we asked to test everything we test for.
21 We thought that would be a simple way of eliminating a lot
22 of compounds that would be in dispute, not in dispute, and
23 would be consistent with the same test we ran every time we
24 ran a test ourselves.

25 The defendants took the position that we couldn't

1 test for anything more than the PFC compounds, and,
2 therefore, we were barred from testing the other suite of
3 compounds that we'd normally test for, saying that it's
4 irrelevant to our situation.

5 I don't believe it's irrelevant. The utilities
6 believe it's a reasonable test to check their discharge to
7 see if any of the other compounds are there. We have no
8 reason to anticipate they are. We have no reason to
9 anticipate they're not. So, we thought it was a simple
10 solution to check it once. So, the loggerhead there is can
11 we test for beyond the existing PFC compounds.

12 One of the filings we had made for you was our
13 authority to report to the Legislature on House Bill 56.
14 And your Honor's got that in the file. And it makes some
15 important points. One is that the PFCs are throughout the
16 sediments of the river in different volumes. So, we know
17 we've got a sediment problem. We're not sure exactly how
18 to compare the solid samples in the sediments with the PFC
19 compounds that are in the water. That's in further study.
20 But we know we have sediment in the river that will be most
21 likely releasing to the river for a long period of time.

22 The second thing we found is that, when we did the
23 testing with the University of North Carolina at
24 Wilmington, they produced not two, but 33 different
25 perfluorinated compounds. So, there's a whole suite of

1 compounds out there that are perfluorinated --
2 perfluorinated -- and it isn't just GenX. And limiting us
3 to either GenX or limiting us to GenX PFOA doesn't resolve
4 the problem, because, as the chart which we presented
5 showed, when you add them all together, they well exceed
6 140, even now when we're dramatically down with GenX. We
7 don't know the synergistic effect of these chemicals. We
8 don't know the individual effect of these chemicals. There
9 is so much unknown about these chemicals that we need to do
10 further research.

11 So, we want freedom in what we test for, because
12 there is very little history of anybody having tested for
13 them before or having them identified.

14 So, I didn't perceive that when we left this
15 courtroom that we were somehow restricted to only testing
16 for a limited number of PFC compounds or that we couldn't
17 test for everything we wanted to. I thought we left with
18 the right to test to see if there was a problem. That one
19 of the central disagreements.

20 And, obviously, we'll live with what the Court
21 decides here on this issue, but we thought it was fair. As
22 our studies have shown us, we've got a real problem in this
23 whole river with this issue and from air depositions, as
24 now it's proven from the work the state's done, that this
25 is almost ubiquitous in the environment of the Cape Fear

1 south of the Chemours plant.

2 And, again, the utilities problem here, your Honor,
3 is not so much what was the history, although that's
4 important, it is what kind of design do we have to have in
5 a plant. And we have now come to a preliminary design,
6 that's been published, that we are looking at putting in
7 granular-activated-carbon filter system, that the cost of
8 those systems are in the approximate range of \$40 million
9 to put in. It's a huge commitment to our individual rate-
10 payers to float another bond issue for \$40 million to
11 address these issues.

12 So, knowing what's there is really important. And
13 that backs up to the question of where we test. We want to
14 be -- before there's any treatment, we want to know what it
15 was at the maximum that it could have been.

16 The defendants make points about the fact that
17 they've changed their processes. Things that change are
18 not the same. That may be true. But we suspect that the
19 makeup of the products before they're treated at all remain
20 the same.

21 And, as we pointed out in the letter we showed you
22 the last time, even their own engineers said in order to
23 really get an idea, you need to find the maximum
24 concentrations which is in the material before you treat
25 it.

1 So, the treatment -- getting these samples at where
2 they could be the most descriptive of what type of
3 chemicals are being released before treatment leaves us the
4 ability to figure out what type of chemicals we need to
5 look for in the sediment and in our water column. So, I
6 don't know if we're still in dispute about the PFC
7 compounds, but we want to be able to have some freedom to
8 experiment with the sample in order to try to find out what
9 is in there.

10 The other issues, I think, Mr. Leopold's addressed on
11 the history question. But we've provided the Court with
12 where we are.

13 THE COURT: What about where your clients are on
14 the smokestack testing? Do you all want to do that, too?

15 MR. HOUSE: The smokestack testing, yes. But
16 let's -- the state has concluded -- and you'll see in their
17 responsive materials they filed most recently and the
18 state's complaint that triggered that -- the state has
19 concluded that there is a substantial amount of air
20 deposition which is causing the groundwater problem all
21 around the plant, which is, obviously, also landing in the
22 river.

23 So, we've got the release of groundwater going into
24 the river from the air deposition, then we've got the air
25 deposition directly to the river. So, understanding the

1 quantity of the pollutants coming out of the stack is
2 important from those two purposes, groundwater release to
3 the river and air deposition.

4 We don't represent -- the authorities -- they don't
5 represent the individuals who are complaining about --

6 THE COURT: No, I know, but I'm just trying to
7 make sure I understand your position on whether -- with
8 respect to the redesign -- that your engineers and the
9 people that are assisting you all with that think that that
10 information is important to them to redesign what you all
11 are doing with respect to -- to what your responsibilities
12 are. See what I'm saying? I mean, I'm sure I get with
13 respect to the --

14 MR. HOUSE: It -- I don't want to overstate
15 this. I want to be honest with the Court.

16 THE COURT: Right.

17 MR. HOUSE: The deposition -- the makeup of the
18 discharge is important to us, whether it's three PFCs or 33
19 PFCs. I would guess that because the process is an air
20 emission versus a water discharge, that there are
21 differences.

22 So, initially, we are currently concerned about what
23 they are. It may turn out that the air discharges aren't
24 as significant to us as the water discharges. In fact,
25 logic would tell me that's going to be the case. But

1 there's no reason not to at least find the answer out what
2 are the air emissions and how are those speciated down to
3 the individual PFC compounds.

4 THE COURT: I mean, I thought at the last
5 hearing I had a pretty good sense about how the water
6 samples would be gathered. And I realize this may not be
7 primary issue, and Mr. Leopold can supplement; but tell me
8 how a smokestack emission sample is even gathered.

9 MR. HOUSE: Well, these are protocols -- we're
10 not asking to change the protocol for the existing air
11 permit. Under their existing air permit, they have to
12 sample smokestacks. And, your Honor, there are various
13 ways of doing it, but, normally, you'd run a tube through a
14 hole in the stack to the other side of the stack, and you
15 test the air going out by the volume, and that particular
16 tube takes in the sample. It's a common methodology
17 through all of our industries for sampling air samples.

18 We're not asking to do -- we're not asking to do an
19 air sampling that's different from the sampling that they
20 or the state would normally do.

21 What has concerned us, as you would see from the
22 state's letter and in its more recent complaint, is that
23 originally what was -- the GenX number, just that one
24 compound, that GenX number, the state was under the
25 impression that it was one number, a fairly low number.

1 Namours came back and said, in December or late last year,
2 whatever it was, that it's a bigger number. The state,
3 looking at it, said, no, no, it's a much, much bigger
4 number. So, within one year, now, this number has grown
5 dramatically.

6 And, again, I think our interest here, the
7 authority's interest, we know the GenX number, because they
8 and the state are talking about GenX number. We don't know
9 what else is in that air sampling. But we're not asking to
10 do a different kind of air sampling. It's the same air
11 sampling. We would just sample for more compounds than
12 historically have been sampled for.

13 Does that make sense?

14 THE COURT: And how often does the state do that
15 sampling pursuant to its permit?

16 MR. HOUSE: It depends upon the air permit for
17 an industry. It could be annually. It could be every five
18 years. Air sampling has different kinds of protocols. I
19 honestly don't --

20 THE COURT: Okay.

21 MR. HOUSE: I've looked at their permit. I know
22 what they're sampling for. I wasn't paying attention to
23 protocol that may have been required once every five years,
24 when they renew the -- air permits are good for five
25 years -- and once every five years they come back up.

1 The issue for isn't exactly -- we don't want to
2 change the sampling methodology and the sampling ports. We
3 want to use the same ones they use and the same ones the
4 state uses. What we want to do is take the sample and know
5 what's in that sample more than just GenX, if that makes
6 sense to you.

7 We're not asking to do anything unusual, as far as
8 drill another hole in the plant, putting some type of weird
9 sampling device on. We're asking to collect the sample and
10 then be able to speciate that sample into its various PFC
11 compounds.

12 So, we're -- it's a slightly different need. And, as
13 I've said to you, the water samples are clearly the most
14 important thing to us, because that's the biggest volume.
15 We are still mystified about the amount of PFC compounds
16 coming out of the air such that it's causing the
17 groundwater probable, which is -- when we had our last
18 hearing, it was unexpected to us.

19 THE COURT: Okay. Thank you.

20 Mr. Leopold, did you want to add anything else?

21 MR. LEOPOLD: No, your Honor, just specifically
22 as to the point that the Court inquired about the air
23 sampling.

24 Basically, there are very specific US EPA guidelines
25 essentially taking the fugitive air qualities from the --

1 air sort of leaks out from various piping, which is normal,
2 and you just take those samples. It's not intruding on
3 anything. It's not destructive in any way. It's not
4 taking apart any pipes, anything of that sort. All under
5 the US EPA guidelines that are standard and appropriate
6 that are done on a regular basis. And we would take those
7 samples and also do appropriate testing along those lines
8 in the protocol that we would wish to do.

9 THE COURT: All right. I'll hear from
10 Mr. Reilly or whoever wants to speak next.

11 MR. REILLY: Thank you, your Honor. Let me
12 begin by -- I want to bring some clarity and some facts to
13 this discussion. Not just lawyer talk, but I want to bring
14 your Honor some actual hard evidence about what we're
15 talking about here today. But I was very interested that
16 Mr. House indicated that this non-PFC testing that brings
17 us here today, he just acknowledged, has nothing to do with
18 the Chemours plant. And that's what -- that's the
19 objection that stopped our discussions. And so, I find it
20 a fascinating acknowledgement on his part. And, quite
21 frankly, that's where our discussions broke down, and
22 that's why they filed a motion.

23 And, in fact, your Honor didn't order, at the hearing
24 in January, that sampling occur. What your Honor
25 instructed the parties to do was to get together and see if

1 they could agree on something; and, if they couldn't, come
2 back and you would listen to the arguments and then you
3 would make a ruling.

4 As far as air sampling is concerned, I'll get into
5 that in greater detail. But, quite frankly, your Honor,
6 that's not before your Honor today. And we would have a
7 lot to say about it, because all the things that you just
8 heard will provide you with concrete, factual,
9 evidentiary-based information that says that's just not so.

10 There is no EPA standard for making determinations of
11 PFC testing through stack testing. As a matter of fact, we
12 submitted to your Honor as a supplement to our prior
13 submissions that last very voluminous -- and I apologize
14 for the size, but it's the amount of work that went into
15 it -- the submission that Chemours did to the Department of
16 Environmental Quality that we addressed, among other
17 things, air sampling in enormous detail. And, in fact,
18 what you will learn from that is that there is no EPA
19 standard for doing stack testing for PFCs. That had to be
20 created by Chemours in order to determine how you capture
21 these substances, how you control these substances, how you
22 extract these substances from whatever you attracted them
23 with, and then how you test for them.

24 So, you will learn, when this issue is appropriately
25 addressed, teed up, that this is anything but this snap

1 that was described by counsel, because it simply isn't so.

2 As a matter of fact, the DEQ was going to do its
3 sampling along the sampling that's already been done by
4 Chemours. It's already been done. The testing has already
5 been performed. The analysis of the testing has already
6 been performed. And it's already been submitted to the
7 Department of Environmental Quality. And the results are
8 available to everybody. And I offered that to everybody.

9 I said, hey, if you want to know what the results of
10 the sampling have been, the -- the DEQ said, you know what?
11 This is too hard. You guys do it. We'll accept your
12 results. You guys do it. So, that's the way it worked.

13 So, let me go back to -- okay, so what is this
14 emergency sampling issue all about? When the parties came
15 before you in January, the position of the plaintiffs was,
16 and especially the water companies, was we are in need of
17 being able to determine what is in the water, because we
18 know GenX is in the water, but we don't know what other
19 PFCs may be in the water.

20 Testing being performed by others, and perhaps by the
21 folks at the water companies, as well -- we haven't seen
22 their testing completely yet -- but at that moment they
23 said, we don't know what all is in the water. You heard
24 Mr. House, just a moment ago, said there may be 30
25 compounds that are relatively similar to GenX.

1 Well, in fact, at the very moment they were before
2 you in January, both water companies had already engaged
3 consultants. In the case of Cape Fear, it was Black &
4 Veatch, an engineering company out of Kansas City,
5 Missouri. In the case of Brunswick, it was an outfit by
6 the name of Smith. I'm not as familiar with them as I am
7 with Black & Veatch.

8 But those folks were hired to, and they did, engage
9 in extensive analysis of the water being brought into and
10 delivered out of both Cape Fear and Brunswick.

11 And I'm told that I have an ELMO in front of me, your
12 Honor. I don't know exactly how to work it. I'd be happy
13 to hand up some demonstratives here.

14 THE COURT: That's fine, however you want to do
15 it.

16 MR. REILLY: What I'm going to show you first is
17 that both Cape Fear and Brunswick, through the work of
18 their consultants, have already tested for and identified
19 the presence of the various substances that, when we asked
20 them what PFCs are you going to be testing for, they
21 already had that information.

22 Will you open that? I'm sorry to take the time, your
23 Honor, but if you could open that for -- open it to the
24 PFCUA slide.

25 May I approach, your Honor?

1 THE COURT: You may.

2 MR. REILLY: Thank you.

3 THE COURT: Thank you.

4 (Counsel conferring off the record.)

5 So, after -- well after we were here, and, quite
6 frankly, after our negotiations had broken down because of
7 the requirement that they be permitted to test for these
8 nonrelated substances, which I'll get into in a little bit,
9 we learned that Cape Fear had already been provided by its
10 consultants, Black & Veatch, as of March 30, 2018, this
11 list of chemicals that they tested for and identified.

12 If you turn the page, your Honor, you'll see that
13 Brunswick County had done exactly the same thing through
14 its consultants, Smith.

15 If you turn the next page -- this is really the ham
16 in the sandwich, as I say, and that is we matched up what
17 they told us they were going to test for. And we didn't
18 have any objection to them testing for all of these PFC
19 substances. They aren't all PFC substances, actually, but
20 we didn't have any objection to them testing for all of
21 these substances.

22 But when we compared what said they desperately
23 needed to be able to design a treatment system for their
24 respective water plants, we looked and compared to see
25 whether or not what their consultants had already tested

1 for, already evaluated, and had already designed treatment
2 plans were included. And the answer is yes.

3 You can see from the checkmarks that, especially in
4 the case of Brunswick -- and I'm sure these guys share
5 information -- I would be surprised if they didn't -- but
6 they had already tested for, identified and reported on
7 virtually every one of these substances. The only
8 exception that I see here, especially in the case of
9 Brunswick, was a substance identified at PFODA.

10 So, to say that they were in desperate need, they
11 couldn't really identify what was in their intake water or
12 because their current treatment apparently doesn't treat
13 any of this, so it's in their intake and their outtake --
14 in other words, what's being sold to customers -- they
15 actually did know the answer to all those questions. And
16 if there ever was an urgency to this testing, you can see
17 it doesn't exist.

18 But, in addition to that, if you turn to the next
19 page, you'll see that the utility companies have already
20 identified various filtration methods. Each of the
21 consultants have identified three potential infiltration
22 systems to add to their existing facilities.

23 Now, interestingly, they came to -- their consultants
24 came to different conclusions as to what filtration system
25 ought to be incorporated. And they went through analyses

1 of -- I don't want to bore your Honor with, you know, why
2 they came to the conclusions they did, but the Cape Fear
3 consultant said, hey, you guys ought to put in what they
4 call a GAC system, an activated charcoal filtration system,
5 two layers of it, as I understand it. And that's on the
6 next page.

7 You've got a page that is titled, CFPUA has informed
8 its customers that granular activated carbon has been
9 proven effective. This is what Cape Fear has already told
10 its own customers.

11 So, to come here today and say, we don't know, we
12 need emergency testing, after they just told their own
13 customers that they don't know is, quite frankly,
14 incorrect.

15 So, how about Brunswick? Same position. Same
16 situation.

17 Brunswick has already received, on the next page, an
18 individual recommendation on filtration method. And keep
19 in mind these are substances that nobody's established are
20 harmful to humans. And certainly not -- as we're going to
21 see in just a minute, what levels of presence these
22 substances are in in their intake water, their raw water,
23 what they call their raw water, and their outflow water
24 there, the water they sell to their customers.

25 So, Brunswick as already received an individual

1 recommendation on filtration system. I'll talk about that
2 in just a minute.

3 And, if you go to the next page, Cape Fear has
4 already authorized implementation of their filtration
5 system, the GAC system.

6 The system that was recommended by Brunswick's
7 consultant, Smith, was a different filtration system, one
8 called reverse osmosis. And the reverse osmosis system was
9 actually considered and rejected by the Cape Fear folks.
10 They have their reasons, not important to the case at this
11 juncture.

12 And, of course, the next page indicates to your Honor
13 that Brunswick County has also already authorized the
14 implementation of the recommended filtration system for
15 Brunswick.

16 Are these systems already in pilot performance?
17 Yeah, they are. Have these consultants already represented
18 to these litigants, who are saying, your Honor, we are in
19 desperate need of this information, have they already
20 informed their clients that these systems resolved the
21 problem? Yeah. They apparently resolved the -- they
22 create the elimination of these substances in their
23 finished water, along with resolving a whole host of other
24 problems, the kind of problems that Mr. House mentioned,
25 that he knows, that his client knows are in the water,

1 unrelated to Chemours, and which the water companies have
2 to deal with.

3 So, what we did was we objected to these folks
4 because they were totally unrelated to why they came to
5 your Honor. The emergency, if it ever existed, is clearly
6 not present.

7 But if the condition ever warranted some sort of
8 action by your Honor on an urgent basis, it definitely
9 didn't include -- and this is what we wrote to them and
10 said we object to -- searching for volatiles, semi-
11 volatiles in water, dioxins, polychlorinated biphenyls and
12 pesticides, perchlorates, heavy metals and trace elements,
13 total cyanide, bromide, phenols, silica, nitrates,
14 estrogens and hormones, pharmaceutically active compounds.

15 Yes, are these things all found in the Cape Fear
16 water? Probably so. Is it incumbent on water companies to
17 protect their customers against these substances? Probably
18 so. I don't represent water companies, so I don't know
19 exactly what their obligations are. But probably so. But
20 why are they coming to your Honor asking you to, on an
21 basis, allow them to test for all these substances when
22 they've just acknowledged in front of you that they aren't
23 related to Chemours. And, obviously, they're not. We're
24 not in the pharmaceutical business, we don't make estrogens
25 or hormones, we're not in the -- I mean, this is -- so, we

1 objected. We objected. We said, you know what? On top of
2 that, Cape Fear told us, you know what? We have to report
3 the results of whatever sampling we do. We have to report
4 it. We have to make it public.

5 And we said, wait a minute, this isn't right. You're
6 going to announce to the world that Chemours has all these
7 substances in its water. Are you going to be announcing to
8 the world that, oh, by the way, they're not from this
9 plant?

10 I don't know -- there's an article coming out,
11 virtually, for sure, every week about the Chemours plant.
12 It is a media darling. Probably a bad word. People will
13 tell me, oh, my goodness, Reilly, you didn't say darling.
14 But the bottom line is they are frequently in the media.
15 No question about it. And so, can you imagine the coverage
16 of, oh, look at all these substances that are found in
17 Chemours' wastewater. It would be completely unfair.

18 And so, we objected. And we said, hey, why? And we
19 really didn't get a very good answer back. And so, that's
20 the reason why we're here.

21 Well, to talk more about the urgency of the
22 situation -- your Honor, if you turn to -- I think it's the
23 next page. It's the one that says, levels of GenX in the
24 Cape Fear River. It might be two down.

25 So, what you see is that the DEQ, the North Carolina

1 Department of Health and Human Services, as of July, 2017,
2 created a provisional health goal of 140 parts per trillion
3 of GenX. And what is a provisional health goal? This is
4 a -- I won't get the wording exactly correct -- but it
5 basically says, at this level, even the most susceptible
6 person, an infant, that's going to be drinking this water
7 at volumes that infants might consume water, for the rest
8 of your life, does not present a health issue.

9 So, if you turn the next page, you'll see that the
10 Cape Fear folks have already acknowledged that in terms of
11 the presence of GenX in the -- their raw water intake --
12 that chart is one that was provided by Mr. Fletcher, who
13 is, as I understand it, the head of Cape Fear. And this is
14 a chart that he used in a presentation that he made before
15 the House Select Committee. And it showed that ever since
16 July of 2017 -- in other words, for almost the last whole
17 year the level of GenX in their water intake has been well
18 below this 140 parts per trillion.

19 If you turn to the next page, you'll see that that's
20 been true not only for Cape Fear, but also for Brunswick.
21 The numbers for Cape Fear are on the left side. Their
22 testing was done -- this was their most recent testing --
23 April 5th, April 12th and April 19th, their levels of GenX
24 in their water, raw water -- that's their intake water --
25 were measured by their consultants at 5.6 parts per

1 trillion, 27.5 parts per trillion, and 4.95 parts per
2 trillion. Their finished water was similarly very low.

3 On the right-hand side you have Cape Fear's finished
4 water values, also provided by Cape Fear, and they measure
5 from January all the way through April 17th. And their
6 values are also either in the 37, 40, but as we get closer
7 to today, they're down into the single digits and very low
8 double digits in terms of parts per trillion. Way below
9 140 parts per trillion.

10 All right. So, is there really an urgent need for
11 this water sampling? Well, clearly, not based on the
12 arguments that were made by plaintiffs' counsel today nor
13 back in January. And your Honor already observed at the
14 last hearing -- and I apologize for not having been here --
15 but your Honor pointed out that ordering sampling, letting
16 people come on your premises and sample, is not something
17 that is done willy-nilly. You really have to have a good
18 reason to do it.

19 So, now, anticipating another argument that I think
20 plaintiffs' counsel's going to make, is -- they say, well,
21 if we don't get a chance to come on and measure your --
22 look for these chemicals in your wastewater stream today,
23 then how will we ever know at what volume you were putting
24 them into the river way back before you stopped putting
25 this material into the river at the direction of the DEQ.

1 And we've tried to explain to them that this is a
2 complicated facility. It operates at -- running different
3 what they call campaigns or different products at different
4 times, even within a given product in a given day, it will
5 run differences. There is no -- what they ask for is a
6 representative sample of what was going into the river. We
7 say there is no such thing.

8 Today, and for the last six, seven months, all of the
9 wastewater has been leaving Chemours and being shipped out
10 to either Oklahoma or Texas. It has not been combined with
11 the noncontact water. And unless you have the combination
12 of the noncontact water, which is millions of gallons of
13 water, in addition to the wastewater, you have no idea what
14 the level dilution was, what the level of concentration was
15 going out the outfall at Chemours. No way of knowing what
16 was going into the river. It can't be replicated today.

17 Is there information about what was the level of
18 GenX, for example, going into the river before these
19 changes occurred? Yes. This is probably the most sampled
20 substance of North Carolina for sure.

21 If you look back -- all of this is publicly available
22 on the EPA and DEQ's records on their web sites. You can
23 see that in June -- I think it was June 19th of last year,
24 a year ago, they sampled for GenX in the river at Chemours
25 outfall to see what was the level of GenX. Now, back then

1 in June, the guidance level was 71,000 parts per trillion.
2 In July the DEQ changed -- reduced the number from 71,000
3 all the way down to 140.

4 But you'll see -- and we can provide it to your Honor
5 if you'd like to see it -- that the results obtained by the
6 DEQ, the EPA, on June 19th was -- and even in the same day,
7 the variation was between roughly 20,000 and 40,000 parts
8 per trillion. On the same day there was a hundred percent
9 variation. But if you want to know what was going into the
10 river then, there you have it.

11 Now, today, to go to our waste stream that isn't
12 being diluted, that isn't being treated, it's also not
13 being treated as it was back then; you end up with what I
14 colloquially call garbage in garbage out. You don't get
15 information that's usable in any form in this litigation.
16 It's not diluted. It's not treated. And the run of that
17 day, there is no standard run. It's not like going to a
18 General Motors assembly plant, and today we're running
19 Buicks. Oh, this is our Buick plant, so today we're
20 running 500 Buicks an hour. It's not that kind of
21 operation.

22 So, this is -- I'm not standing here saying, you
23 know, we're completely opposed to any sampling at some
24 point in time. I am opposed to air sampling, because not
25 only is it extremely difficult --

1 THE COURT: I understand that. The air
2 issue, I don't think, is before me today. But I'm trying
3 to understand, if you agreed to -- if the core of the
4 dispute is ultimately what they test for, then there was an
5 agreement on gathering the samples and then letting them
6 test. I mean, your argument about each -- essentially --
7 or what I took from it was that each day is different. So,
8 it's not --

9 MR. REILLY: Right.

10 THE COURT: -- it's not an assembly line of the
11 2017 Cadillac Escalade coming off the run. And each day
12 what's going to come out of that is going to be different.
13 But you all were still open to allowing that to be
14 analyzed, with some limits on what's tested.

15 So, there seems to be a little bit of a disconnect to
16 me there.

17 MR. REILLY: And I appreciate that, your Honor.
18 But I wanted to make sure that your Honor understood that
19 if there was ever urgency, it doesn't exist.

20 But Chemours -- you know, they've taken the position
21 of we want to be transparent. They've taken the position
22 that you need to understand that if you come here and test,
23 sample, you're not going to get what was going into the
24 river back in any earlier point in time. And I want your
25 Honor to know that, too.

1 THE COURT: I understand. But, you know, I'll
2 hear again in particular from Mr. House. I think part of
3 the whole issue was trying to make sure what the utilities
4 are designing is going to do as reasonably effective a job
5 as it can in keeping things safe for the people that drink
6 water in those areas. I mean, at its core. And so, it's
7 not in connection with a plant redesign. It's -- you know,
8 if I allow this, it's not at all a ruling on the
9 admissibility of any of it.

10 And your papers pointed out that -- and you and
11 Mr. Leopold and Mr. House, all the lawyers that do this
12 kind of work, know that in these types of cases there are a
13 lot have Daubert motions, to put it charitably. But we're
14 not even close to that.

15 MR. REILLY: Right.

16 THE COURT: All right. Anything else that you
17 wanted to tell me?

18 MR. REILLY: We have submitted to plaintiffs'
19 counsel a protective order about what can be done with this
20 information, and that sort of thing. And we said, hey, for
21 purposes of this litigation, we don't have a problem; but
22 the dissemination of this information to the media, and
23 things like that, what -- we're opposed to that.

24 This is not supposed to be a media event. And so,
25 they said, no, no, we're obliged by law to report any

1 sampling we do. And I swear, I searched. I could not find
2 where -- if their lawyers get to come on somebody else's
3 facility and do sampling, that that required Cape Fear, or
4 anybody else, to report the results of that testing.

5 So, I said, you know what, that doesn't seem right,
6 either.

7 Now, I'm not going to be surprised if Cape Fear,
8 because of its role as a public utility, has an obligation
9 to report whatever it's sampling for whatever is coming
10 into its facility and whatever is going out in the finished
11 water, that may well be. But we're not talking about that.
12 We're talking about coming onto the Chemours site and
13 testing the Chemours wastewater stream that hasn't even
14 gone into the river, and now you're going to -- Cape Fear
15 is going to report that? I mean, it bears no relationship.

16 We have the data as to what was the level of, for
17 example, GenX going into their facility. They have that
18 data. We would love to see all their data, too.

19 They have not made an offer to provide us with their
20 data about what's been going in -- what they've been
21 measuring in their facility.

22 But it's just the use of the material. For
23 litigation? Great. I think it has no value in this case,
24 but that will be, as your Honor points out, that's an
25 argument for another day. But in terms of where is this

1 obligation, why can't you agree that this will be used --
2 you can provide it to your consultants, you can provide it
3 to the Court, that sort of thing. But are we trying to
4 make a media event out of this, too? And I'm opposed to
5 that.

6 Thank you, very much, your Honor.

7 THE COURT: Thank you.

8 MR. REILLY: Before I sit down, let me make sure
9 from my many friends if I've missed something.

10 No. Thank you, very much, your Honor.

11 THE COURT: Mr. House, what would be -- if it is
12 the utility's position, what is the legal obligation? Do
13 any tests that any of your experts conduct in any
14 litigation that the utilities are engaged in, you
15 automatically make all that -- you are required by North
16 Carolina law, or something, to make that publicly available
17 if your client is in litigation? That's unique. That's
18 interesting. I've never heard of that.

19 MR. HOUSE: No, I never made that argument, your
20 Honor.

21 THE COURT: Okay.

22 MR. HOUSE: I've told them the public records
23 law applies to anything that we have that are public
24 records. Now, the reason that we've asked to give the
25 information is to provide it to our engineers to help with

1 redesigning the plant. So, you can't have the engineers
2 who's got it to redesign the plant, say they can't use the
3 information and tell why they're doing what they're doing.

4 But let's go back to -- I've got to give it to the
5 engineers.

6 THE COURT: Well, I understand that.

7 MR. HOUSE: I'm not going to sit there and hold
8 it in my pocket. It doesn't do me any good. The engineers
9 have got to use it to determine -- I'm not after --
10 remember, I'm not after quantity. I'm after what are the
11 constituents that they are discharging.

12 THE COURT: Right.

13 MR. HOUSE: And that's where he and I miss each
14 other completely on this matter. I'd go back to the
15 argument that I made with you the day we were here to read
16 their consultant's letter in 2002, but DuPont's letter to
17 the state. It says, there may be hundreds of these
18 by-products at low concentrations. Now, in 2002, we're
19 talking about parts per billion. In 2017, we're talking
20 about parts about per trillion. That's the advancement of
21 science.

22 What I want to know is what's in those amounts, those
23 potential discharge amounts, so I can then look for them.

24 The lower the concentration -- as that very same
25 letter said, the lower the concentration, the lack of

1 ability to detect it.

2 So, I'm not looking at it when it comes into my
3 intake as to what could have gone into the river over a
4 period of time, because the detection limit may be -- on
5 these particular compounds, we don't even know what we're
6 looking for and the detection of it may be impossible to
7 determine.

8 If we get a chance to look at the hundreds of
9 byproducts, we may find that not only are there 33, there
10 may be 75 different chemicals.

11 I find it unique to say that because the authority
12 has got to do something to protect the citizens and is
13 trying the best it can to figure out what's coming in, that
14 we can't look at what they've got as the source. I want to
15 know what's at the source so I can then say, hmm, I didn't
16 know about this compound, number 34, 35, 36 and 37. I want
17 to go test and see how I know it was in the discharge. Is
18 that in our intake.

19 And there were no tests on GenX until 2017. We don't
20 know the history of this plant. That's absolute baloney.
21 They didn't test for it. At least, they've told us they
22 didn't, because that was one of the things we argued about
23 the first time. You have tests. But we don't have these
24 tests. Now, they may have them, but they haven't told us
25 about them, and they didn't give them to the state.

1 Our material -- we report our test results every week
2 on the CFPA letter. We give the public the list of
3 everything we test for.

4 THE COURT: And your testing is at your intake
5 and at your outtake?

6 MR. HOUSE: And the outtake.

7 THE COURT: Right. And that's why -- I mean,
8 and I totally get that, but just on the issue of -- I mean,
9 protective orders are pretty standard in a lot of
10 litigation, and in terms of testing that your consultants
11 do in connection with the litigation, it just seems
12 different to me than testing at the intake and outtake of
13 your facility. And I don't have the statute in front of
14 me, but most statutes that deal with public records have an
15 exception for court orders, and that's why, when states are
16 involved in litigation, and there's an exception, and it's
17 not publicly available, because the Court said it's not to
18 be.

19 MR. HOUSE: And if you say it's not to be, Judge
20 Dever, I assure you it won't be.

21 THE COURT: Right.

22 MR. HOUSE: So, I don't -- I didn't know how to
23 divide between taking and giving it to my engineers, then
24 coming back, and them reporting it to the board, saying we
25 recommend this type of treatment now that we know this

1 information different, and not telling a lie.

2 THE COURT: No, I understand. And that -- I
3 mean, again, that can be something to cross down the road.
4 But at least we're all on the same page that there's not --
5 because I certainly -- I've been around a while, not as
6 long as some, but I've just never heard of any state
7 authority or an entity subject to the public records laws
8 somehow saying, if there was a federal court protective
9 order, they weren't going to comply with it.

10 MR. HOUSE: Absolutely we would comply with such
11 an order.

12 THE COURT: Right.

13 MR. HOUSE: We would do so.

14 THE COURT: Okay.

15 MR. HOUSE: So --

16 THE COURT: And did you all get -- and I want to
17 hear again from Mr. Reilly, did you all even get close
18 enough to an issue about -- I know that it talked -- the
19 proposal talked about over a three-day -- or over three
20 days. I mean, how much time are we talking about in terms
21 of -- did you all get that far in your discussions on
22 meet-and-confer? Is it over the course of a 30-day period,
23 you know, or a three-week period, once every Wednesday?
24 You know, did you all get that far?

25 MR. HOUSE: I thought we had gotten through all

1 the issues regarding testing except for the scope --

2 THE COURT: Right.

3 MR. HOUSE: -- which Mr. Reilly has referred to.

4 And if that were the only issue, I think that
5 would have been resolved. Mr. Reilly is here. What he's
6 here for is to convince you do not allow the expedited
7 discovery from beginning, with this theory that they've
8 done such a good job of analyzing this, they shouldn't be
9 able to come on and get our sample. I mean, that, to me,
10 is an absurd statement.

11 We even got one letter from them that said, now that
12 you've identified these 32, we have testing protocols for
13 two of them. We can tell you how to test for it. I was
14 absolutely blown away. Why didn't they tell us that
15 before? They've probably got testing protocols for all of
16 this stuff. Well, not all of it, but some of it. They
17 haven't told us that.

18 We're out here in the dark doing the very best we
19 can. And they've got the information. And we can find out
20 what it is we should be testing for. Now, let's say that
21 we learn from their information that there's a thirty-
22 fourth compound. Now we test for that in our intake, and
23 we find it in our intake. Then we may take action because
24 of that. I don't think that, if we go back and find it in
25 our intake, that would suffer any type of protective order.

1 I can understand you're saying that I can't use what
2 I found in their internal waste stream outside your
3 protective order, but if I take it and then find out what
4 I'm going to go sample for, and then find out that I've got
5 it in my intake, I think that's a public record, because
6 I've tested my intake for it, and I should be able to
7 disclose -- or it should be disclosed to the public.

8 So, again, this whole theory was to allow us to
9 figure out what it is. And we're doing the best we can.
10 We're over here -- now you're telling me we don't need any
11 more because you've done a good job. Well, we've found 33
12 of them. I suspect there's a bunch more. At least, that's
13 what they say in 2002. And that's what we're after.

14 And if this deal is all about whether or not I test
15 for the other compounds, and if he'd have made the proposal
16 to me, we wouldn't be here today. We're here because he
17 doesn't want you to let us test at all. That's what he's
18 arguing. Ninety percent of that argument that you just
19 listened to wasn't about my separate compounds for BOCs.
20 It was about whether or not we should be testing at all.

21 That's what this argument -- that's why we're in
22 court today, so they can get another shot at trying to
23 convince you to reverse the order you made back in --
24 December? Is that when we were here?

25 MR. LEOPOLD: January.

1 THE COURT: January.

2 MR. HOUSE: January. We've been beating this
3 issue around since January.

4 THE COURT: Well, I just had ordered you all to
5 meet and confer. And you all -- and all the progress that
6 you made. And Mr. Leopold acknowledged it. I went
7 through -- I read through all the papers and all the
8 correspondence between you all, and that is a very thorough
9 meet-and-confer.

10 MR. HOUSE: Absolutely. We've conferred plenty.

11 But with regard to the additional testing, we don't
12 know if that plant discharges or not. I mean, it's a
13 little unfair to say we know they don't discharge. That's
14 not the truth. We don't know -- we didn't know they
15 discharged GenX until 2016.

16 THE COURT: Right.

17 MR. HOUSE: Okay? We don't -- if there are
18 other compounds coming from their processes, we don't know
19 that.

20 THE COURT: Right.

21 MR. HOUSE: So, it was a theory that solved two
22 birds with one stone. If your Honor thinks that's too
23 broad, then fine.

24 THE COURT: Well, and on the protective order
25 issue, again, there's a difference between, you know, if

1 you all test for something, and then you decide to change
2 your systems and publicly say, you know, we've tested our
3 intake now -- I mean, that, to me -- I mean, I totally get
4 that, but it's different than saying, oh, by the way, we
5 ran all these additional tests because of some discovery
6 that a judge allowed us to do and that we found this was in
7 some of the things being processed at Chemours. Right?

8 I mean, that's -- it's different. It's basically --
9 it's telling the public we're trying to make sure you all
10 have clean water, safe water.

11 MR. HOUSE: Right.

12 THE COURT: And so, we've tweaked our system.
13 Again, it's different. We've all dealt with so many cases
14 with litigation-related protective orders, it's different
15 than them sort of saying, oh, by the way, this is these
16 companies' fault. Because that's a whole 'nother issue for
17 later proceedings and analysis and Daubert motions, and all
18 the rest of that. If the utility does test for something
19 and decides we're going to tweak our systems, and
20 somehow -- because I get it. You know, it's a lot of money
21 that you all are spending. Because I'm sure your clients
22 are saying we don't want to have to redo this. I mean, I
23 totally get that.

24 MR. HOUSE: Yes.

25 THE COURT: But I -- okay. I think I

1 understand.

2 MR. HOUSE: I accept the protective order --

3 THE COURT: Okay.

4 MR. HOUSE: -- situation, your Honor --

5 THE COURT: Okay.

6 MR. HOUSE: -- from the point of view, as he's
7 expressed today, we never got that level of detail.

8 THE COURT: No, I understand.

9 MR. HOUSE: But I'm okay with that.

10 THE COURT: Okay. That's helpful for me to
11 know.

12 Mr. Leopold.

13 MR. LEOPOLD: Thank you, your Honor.

14 Your Honor, I think one of the -- what we've seen in
15 the last half-hour or so is one of the benefits, but also
16 one of the downsides, of all this being consolidated into
17 one case, because, to be crystal-clear, 99.9% of everything
18 that Mr. Reilly has informed the Court deals with 99.9% of
19 what's going on with public utilities.

20 We have hundreds of thousands of property owners and
21 people with serious health issues that we're dealing with.
22 And, so, if we can take a step back, because I think it's
23 important for the Court to, again, be crystal-clear on
24 talking apples to apples what we're dealing with.

25 First, just in terms of the time-line, just a little

1 bit about what Mr. Reilly had to say as it relates to the
2 air quality. I certainly understand the Court's
3 appreciation that that particular issue may not be teed up
4 today, but I also am sure the Court can understand where
5 we're coming from, that at some point in time, hopefully
6 sooner than later, we would like to do our own testing,
7 noninvasive testing of the air quality.

8 Just because the DEQ has said, oh, it's too difficult
9 for us to do. We're going to rely on Chemours to do the
10 testing, and we'll rely upon Chemours to give the results.
11 That gives us a little bit of pause, when we know
12 historically, and it is undisputed that there have been a
13 lot of things over the last 30 years that Chemours and/or
14 DuPont has not informed the state of or advised the various
15 toxins that have been dumped into the river. So, we do
16 want to do our due diligence at some point in time.

17 So, specifically on the issue for which we are here
18 today on, the Court is correct. The parties were very far
19 down the road in working -- and still working in good
20 faith. In all of these issues, the impediments seem to
21 have occurred not too long ago when it came to the issue of
22 once you have the materials to test, (a), we're going to
23 tell you how to test it, (b), you can only test for certain
24 things. That seems to be the stumbling block. Because we
25 are in agreement, unless something has changed over the

1 last few days that I'm not aware, that we're going to get
2 the before the dilution, in other words, at point zero.

3 THE COURT: Right.

4 MR. LEOPOLD: Right? That's -- the train has
5 left the station on those issues. The core issue at this
6 point in time is the testing. And, look, at the end of the
7 day, I don't know why it's even an issue. What's the
8 prejudice? There is no prejudice. They can do whatever
9 testing they want to do. They can oversee the testing we
10 want to do. They can contest, which I'm sure they will at
11 some point in time through the Daubert issues, or whatever,
12 the testing you did wasn't accurate, or whatever. That's
13 fine.

14 But to tell us that you can't do that testing, that
15 doesn't seem to be fair. That doesn't seem to be just, to
16 at least to me, on the plaintiffs' side.

17 For our client to say, you all are telling us that we
18 can't do this type of testing? That just doesn't seem
19 right, number one.

20 Number two, the protocol which we want to do, which
21 we believe are under the US EPA standards, are appropriate.
22 They want to contest it, fine. Contest it sometime down
23 the road with your experts. Again, Daubert issues at trial
24 or cross-examination, fine. But don't tell us we can't do
25 it that way. You're going to get the results. You're

1 entitled to the results. Make of it what you wish. That's
2 fine. So, I don't understand what the prejudice is.

3 And I must have heard 20 times this emergency motion.
4 Well, you know, we're far down the road from the emergency
5 by now. We're at the stage where we just need to get the
6 information to do this.

7 THE COURT: Right.

8 MR. LEOPOLD: The second thing, I was a
9 little -- with respect to Chemours and DuPont's argument --
10 again, I want to be crystal-clear, because I was a little
11 taken aback that we have this very nice 15-, 20-page
12 printout that was handed to the Court that was prepared by
13 DuPont and Chemours for this hearing to provide to the
14 Court. But the information was information that was
15 gathered from official, if you will, documents, test
16 documents, filed by the utilities in court in which
17 counsel -- counsel -- filed multiple times as filings,
18 which the Court has indicated probably is sitting in stacks
19 by the Court's feet here, that the Court has looked at.

20 But what I found somewhat odd and curious is there's
21 sort of pieces picked -- cherry-picked out of those topics
22 that are in this nice PowerPoint presentation provided to
23 the Court. And what we seek is not cherry-picking. What
24 we seek is full, complete disclosure and information.

25 And I would hope and expect that when Chemours and

1 DuPont stand before this Court that there is not cherry-
2 picking; that the full story is told.

3 And we're all -- some of us in the courtroom remember
4 Paul Harvey, the rest of the story, every afternoon. Now
5 let's talk about the rest of the story. And the rest of
6 the story is not cherry-picking. The rest of the story is
7 that in some of the same documents they took this
8 information it is specifically noted in there that there
9 are at least five new perfluorinated alkaline substances,
10 PFASs, that are part of the review.

11 And, if I may, only because I didn't bring extra
12 copies -- I wasn't aware that this PowerPoint presentation
13 was going to be provided to the Court, but they have it.
14 And I'm referring, so they can pull it, the March 23, 2018,
15 Cape Fear River Public Utility Authority letter that was
16 signed by James Fletcher, the Executive Director.

17 And if I could just -- if I may approach, your Honor.

18 THE COURT: You may.

19 MR. LEOPOLD: And just show the Court, this is a
20 very, I think, educational diagram of a pie shape. And
21 only 14% -- only 14% of the information or toxins are GenX.
22 There are 76% of other perfluorinated acids, PFCAs, that
23 are unknown that have been found. There is 10% of other
24 PFASAs that have no -- that have been found in the water
25 treatment. All we're seeking to do is to do testing that

1 can help explain those issues.

2 So, when yes talk about cherry-picking, sure, we all
3 can cite statistics. You can make whatever out of it you
4 want. But, in order to be full, open and candid with the
5 Court, we want full disclosure. We want to talk about the
6 full rest of the story. And the full rest of the story is
7 that 76% of other toxins that were found in the water in
8 the Cape Fear River that runs along the streams and the
9 valleys in North Carolina to all the people's homes, over
10 \$300,000 people affected, tells us that there are other
11 perfluorinated acids, toxins, that have been found.

12 Some may not be part of this company. I don't know.
13 But if I was a betting guy, I would say there's probably a
14 pretty good chance that for the last 30 years, many of
15 those years of which they didn't disclose even GenX was
16 dumped and polluted the waters of peoples and the rivers
17 and the environment, in the homes, in the piping, that
18 there might be some other things there.

19 And that's all we want to do, is to learn, to get
20 knowledge. So that the nice opening statement that counsel
21 for DuPont and Chemours gave the Court just now was just
22 that, an opening statement, because there is a rest of the
23 story. And that's what a trial is about. And that's what
24 we'll put on during trial; of when it started, how it
25 started, who knew about it, why it was done, why it was

1 uncovered, why it was not disclosed to the state in
2 violations of state permitting. All of those things.
3 Because that's the rest of the story.

4 So, all we want to do -- we have 80% of the
5 agreement. We want to go on site for a day,
6 day-and-a-half, whatever it takes, takes to find water
7 samples. Let us do our testing. If they want copies of
8 it, they want to do whatever they want to do about it,
9 fine. But we're not obligated to follow their procedures,
10 their guidelines, and for DuPont and Chemours to tell us
11 how we're supposed to do it, that's not fair.

12 They can do whatever you they want with it. They can
13 contest it. They can argue about it. Whatever they want.
14 But they shouldn't tell us what to do.

15 In terms of a confidentiality agreement, we're fine
16 with a confidentiality agreement. We don't -- you know, at
17 trial, you know, the full story will come out. The press
18 could hear about it then. That's fine. But that's not our
19 issue. Our issue is finding and seeking the truth. And
20 the way we get the truth is to do testing, unbiased
21 testing.

22 And that's one of the reasons why we want to come
23 back, when the Court finds it appropriate, to do testing of
24 the air quality, so it's not biased, relying upon what
25 Chemours says. Because we know, based upon their

1 information, you can't, respectfully, always rely upon what
2 they say, because they have not been candid with the
3 government, they haven't been candid with the state, and
4 most importantly, they haven't been candid with the
5 citizens in the communities of North Carolina.

6 THE COURT: Have you all gotten down the road of
7 actually negotiating the language of a protective order?

8 MR. LEOPOLD: It's my understanding, and I
9 apologize, I understand a draft protective order was
10 provided to us, and we will immediately look the at it.
11 And I'm sure that -- if it's a standard protective order --
12 and that sort of leads up to the other issues that are teed
13 up for this afternoon -- or for this hearing.

14 We have also a protective order that we have provided
15 in draft form, and I believe counsel for the defendants
16 have reviewed. And I think they are waiting for the Court
17 to say you need to try and finalize it. There is that and
18 some other issues we have noticed for today, as well, such
19 as Rule 26 hearing.

20 THE COURT: Okay.

21 MR. LEOPOLD: If the Court has any other
22 questions, I'm happy to respond.

23 THE COURT: No, that's fine.

24 Mr. Reilly, anything else?

25 MR. REILLY: Very briefly, your Honor. We have

1 provided -- I just wanted to touch on like two or three
2 things.

3 One is we have provided a draft protective order to
4 the plaintiffs. It may need a little tweaking in light of
5 the things they've said today.

6 THE COURT: Right.

7 MR. REILLY: We'll be happy to provide them with
8 another one within the next five days -- two days, if
9 you -- well, today's Friday --

10 THE COURT: Right.

11 MR. REILLY: -- so middle of next week, if
12 that's all right.

13 THE COURT: Okay. That's fine.

14 MR. REILLY: And in terms of -- I don't think I
15 ever stood up here and said that we are retracting our
16 negotiations regarding on-site sampling. And now,
17 obviously, they've come around to -- based on your Honor's
18 inquiry, they've come around to resolving virtually the
19 bulk of the things that I've raised.

20 But I do need to touch on this -- this notion of --
21 of what kind of testing. Just so your Honor gets an
22 understanding of what we're talking about here, it has
23 been -- these substances exist in such tiny quantities that
24 it has been extremely difficult to even identify them,
25 period. Because we're talking about trillionths --

1 measurements that are in trillionths.

2 So, there has to have been the creation of testing
3 techniques for how you even test for it. And Chemours has
4 been very active in collaboration with the DEQ about
5 getting what they call authentic samples for even
6 identifying these substances.

7 The instrumentation that's used to identify them is
8 called gas chromatography. And so, they have to have an
9 authentic sample in order to calibrate the machine in order
10 to determine whether or not that's what you're looking at,
11 and then trying to quantify it.

12 So, Chemours has been very active, and we've provided
13 to plaintiffs' counsel for some of these substances that
14 heretofore had no authentic sampling criteria. We gave
15 them cutting-edge information, proprietary information,
16 quite frankly, about how you accurately test. Because if
17 you use a standard test, you won't get accurate
18 information, because you're not actually testing for these
19 substances that exist.

20 So, in fact, they said what laboratories were going
21 to test for them. They gave three laboratories: Gel Labs,
22 which, I think, is in South Carolina; Villanova, which I --
23 I'm not familiar with Villanova -- it must be at the
24 University of Villanova or Villanova University, but I'm
25 not familiar with it; and the third was Eurofins, which I

1 believe means Eurofins Lancaster. Eurofins recently bought
2 Lancaster. And Chemours uses Eurofins Lancaster for some
3 of its testing of these substances.

4 So, I think we feel very comfortable that Eurofins
5 will use the most accurate testing technique.

6 Now, Mr. Leopold is right. Ted is absolutely correct
7 that they can use whatever criteria they want. But what we
8 were doing -- so your Honor understands, what we were
9 doing, we're taking split samples. They get a sample, we
10 get a sample. We'll send them off to our respective
11 commercial laboratories, and they will come back with the
12 results. And you would anticipate that if the same sample
13 is being taken out that same bucket at the same moment, the
14 results ought to be pretty doggone similar.

15 And so, what we were saying to them is, hey, look,
16 use the most accurate technique. We'll help you. And now,
17 if they're going to use Eurofins Lancaster, I believe they
18 will get the most accurate, most up-to-date technique.

19 We are familiar with Gel Labs. I'm not saying
20 anything disparaging about Gel Labs. And I don't know
21 anything about Villanova. But we've provided this to them
22 so that they would have, in our minds, the most accurate
23 testing technique, period. It wasn't to tell them, oh, you
24 must do it this way. But we wanted to know how they were
25 doing it, so that if they used a different technique and

1 they got a different result, we would be able to understand
2 why that occurred.

3 We weren't telling them you've got to do it this way.
4 I don't -- if we gave you that impression, I apologize,
5 because that was not the intention. The intention was to
6 try to get everybody -- these are scientists. This is
7 cutting-edge science. It's never been done before. And
8 so, we wanted the most accurate techniques to be employed
9 that's possible.

10 If they don't want to do it -- but I can't imagine
11 that Eurofins won't use it now, because we've trained them
12 how to do it. They know how to do it.

13 So, anyway, I just wanted to clear that up.

14 THE COURT: Okay.

15 MR. REILLY: Thank you, very much, your Honor.

16 THE COURT: And how about, Mr. Reilly, in terms
17 of the time frame, because I'm going to grant the motion as
18 to the testing -- I mean, as to the samples. I mean, you
19 all have worked this way. And I do -- I appreciate how
20 much you all have collaborated, in terms of working through
21 a very complicated matter, to gather, to drill down to,
22 really, what the nub of what you all needed me to decide.
23 And I'll recount some of the standard in a minute for
24 purposes of the record.

25 But, in terms of making the Fayetteville Works

1 facility available in order to gather these water samples,
2 is that something that you all would anticipate being able
3 to do between now and -- because I'd like to have kind of
4 an outside date just so that we keep moving. And do you
5 have a sense on that? Or have you all thought through
6 that?

7 MR. REILLY: If I could have --

8 THE COURT: Sure.

9 (Counsel conferring.)

10 MR. REILLY: Okay. Judge, let me just suggest
11 that we put a month or two months time frame on it. The
12 only reason I say that is we have things to work out,
13 protective orders that your Honor's going to order be done,
14 things like that. I can't imagine that 30 days makes a
15 difference here.

16 MR. LEOPOLD: No, I think a month is
17 appropriate. I think longer than that is a stretch.

18 THE COURT: Okay.

19 MR. LEOPOLD: But I think we certainly -- or
20 close to -- if we could have -- maybe have it, say, on or
21 before --

22 THE COURT: June 29th?

23 MR. LEOPOLD: -- maybe right after Fourth of
24 July week, maybe the second week of July.

25 THE COURT: Okay. By July 9th? I mean -- well,

1 I'll put it the end of that week, July 13th.

2 MR. LEOPOLD: And, of course, if we need a day
3 here or there, that's fine. And then what I --

4 THE COURT: And then -- I mean, and then the
5 other, just so that it's clear, and, again, I do appreciate
6 all the work that you've done to get us to this point. And
7 they're legitimate issues that you all have raised. And I
8 really do appreciate it. I appreciate the submissions that
9 you've made, too. But I'm going to have Chemours -- is it
10 Chemours or Chemours?

11 MR. REILLY: Chemours.

12 THE COURT: Chemours -- make the Fayetteville
13 Works facility available to plaintiffs in order to gather
14 water samples from each of the individual wastewater
15 streams at the facility during normal production on three
16 separate dates between now and July 13th, 2018.

17 MR. REILLY: Yes, your Honor, but just so we're
18 clear, these wastewater streams, you said each of them.
19 There are -- I think what you really mean is -- they
20 combine into a wastewater stream or two wastewater streams,
21 rather than each of them.

22 THE COURT: Okay.

23 MR. REILLY: Because that would be monumental.

24 THE COURT: All right. So, and would you agree,
25 Mr. Leopold, on that? You all have gotten --

1 MR. LEOPOLD: Yes, from five streams that we
2 take.

3 THE COURT: Right.

4 MR. REILLY: But they all go -- I understand.
5 But they all go into two streams. It's all the same thing.
6 It's not like we're --

7 MR. LEOPOLD: No, no, we -- we need, and we've
8 discussed, five streams independent --

9 MR. REILLY: Okay.

10 MR. LEOPOLD: -- so there is no dilution. And I
11 believe we already have that protocol worked out.

12 THE COURT: Okay. From the -- okay, you said
13 that the water is clear. And, again, I'm going to get
14 something written and out by the end of the day. But I
15 actually have some criminal sentencings that I've got to do
16 soon. But I'll get this out by the end of today.

17 So that it's to make the Fayetteville Works facility
18 available to plaintiffs in order to gather water samples
19 from -- from the five --

20 MR. LEOPOLD: From the five, yes --

21 THE COURT: -- individual wastewater streams --

22 MR. LEOPOLD: -- independently, yes.

23 THE COURT: -- at the facility during normal
24 production on three separate dates between now and July
25 13th, 2018.

1 The -- I know, in the proposed order that the
2 plaintiffs submitted, you had language about if certain
3 manufacturing or wastewater disposal processes are not
4 operating on those days, then Chemours will permit access
5 as soon as those processes are again operating.

6 I gather, in the meet-and-confer, that you all can
7 get -- you can get three days. I don't really know if I
8 need to put that in the order. Right? I mean just getting
9 three days between now and July 13th. I'll leave that in,
10 but I really expect you all to work that out.

11 And then, fundamentally, on that other issue about
12 restrictions on testing, the plaintiffs are not restricted
13 in the methods they employ to analyze the samples collected
14 or in the chemicals they test for in those samples.

15 Issues associated with that, if you all get way off
16 the scientific highway, then I know we'll deal with it in
17 Daubert motions. So, you can test for it.

18 But none of this has anything to do, has anything to
19 say about admissibility of whatever evidence you all might
20 gather from your tests.

21 And then, finally, to direct you all to a
22 meet-and-confer and submit a proposed protective order for
23 the Court to enter concerning this expedited discovery.
24 And I'll say submit a proposed protective order not later
25 than June 1st. That will give you till next Friday.

1 And, again, just for today -- and some of this will
2 be reflected in the order I enter --I obviously recognize
3 that Rule 26(f) -- or the Federal Rules of Civil Procedure
4 generally don't allow parties to engage in discovery prior
5 to a conference under Rule 26(f) except in proceedings
6 exempted from initial disclosures or when authorized by
7 rules, by stipulation or by court order. Then the rules
8 don't expressly address when expedited discovery can be
9 ordered, and the courts have not settled on a uniform
10 standard.

11 Courts in our circuit, and particularly in this
12 district, look to the reasonableness of the request, taking
13 into account the totality of the circumstances. Some other
14 courts use more the preliminary injunction standard. The
15 reasonableness inquiry that we use looks at the procedural
16 posture of the case, whether the discovery issue is
17 narrowly tailored to obtain information that is probative,
18 whether the requesting party would be irreparably harmed by
19 waiting until the parties conduct their Rule 26(f)
20 conference, and whether the documentary information sought
21 through discovery would be unavailable in the future or
22 subject to destruction.

23 As we've talked about here, the plaintiffs seek this
24 access to obtain the test samples of wastewater that are
25 representative of normal production.

1 I recognize, and the Fourth Circuit certainly talked
2 about in *Belcher v. Bassett Furniture Industries,*
3 *Incorporated*, that entering onto someone's premises is a
4 factor the Court is to consider, and I have considered it.
5 Rule 34(a)(2) does allow this type of discovery once there
6 is a Rule 26(f) conference.

7 Here I do think, looking at the totality of the
8 circumstances, that the plaintiffs have shown good cause,
9 that their requests are reasonable and narrowly tailored to
10 obtain critical information about the wastewater that's not
11 accessible elsewhere.

12 I've looked at all the alternatives that you all have
13 proposed, and I don't -- that the defense proposed, and I
14 don't think that there are adequate alternatives. I don't
15 think their request is overly broad.

16 For purposes of completeness, I again say the
17 preliminary injunction standard does not apply in this
18 district in terms of thinking about this. Often these
19 issues come up in cases where people are seeking
20 preliminary injunctions, but I think that's why our
21 district is actually more correct. In terms of how we
22 approach it, it's like even though generally these issues
23 come up in preliminary injunctions, it's -- that doesn't
24 mean that that's the standard that governs or that someone
25 has to meet the standard of a preliminary injunction to get

1 expedited discovery.

2 And I do think, in particular with respect to the
3 arguments of the utilities and issues associated with the
4 ability to incorporate appropriate remediation technology
5 in their redesigns, that this is -- is unique. So, no one
6 should read this order as somehow expedited discovery is
7 going to be the rule in this district, or, at least, with
8 this Court. I can't control what other district judges do,
9 but this, I think, is a unique case, as reflected in the
10 record in terms of this request.

11 And so, I do grant the motion, and I'll get a written
12 order out by the end of the day today.

13 Just for purposes of completeness -- I know we have a
14 multitude of dockets, and I know our courtroom deputy will
15 be glad to hear me go through these docket numbers so that
16 we can note for the record that we have resolved the
17 following motions:

18 With respect to the Nix v. Chemours case, docket
19 entry 41, the joint motion for discovery was granted.

20 Docket entry 70, which was the Chemours motion for
21 leave to file second supplemental memorandum regarding the
22 request, I grant that motion. I've ready everything that
23 was submitted.

24 Docket entry 78, the third motion for leave to file
25 supplemental materials, I grant that motion. I read all

1 that material.

2 In the Brunswick County v. DowDuPont case, it's
3 docket entry 20, which is the joint motion for discovery,
4 that motion is granted.

5 Docket entry 59 and docket entry 69 are the motions
6 by the defendants to submit supplemental material. Those
7 are granted.

8 Docket entry 63, which was the joint motion for
9 status conference, I think I've already granted that; but
10 to the extent I haven't, that's granted. That's why we're
11 all here.

12 Docket entry 20 in the Dew v. DuPont case -- now,
13 there's a separate complaint in that.

14 Mr. Leopold, do you represent the Dew plaintiffs, as
15 well?

16 MR. JOHNSTON: That would be me, your Honor;
17 Stephen Johnston, Baron & Budd.

18 THE COURT: Right.

19 MR. LEOPOLD: And that was one of the issues we
20 were going to raise. In more of a housekeeping matter,
21 your Honor --

22 THE COURT: Okay.

23 MR. LEOPOLD: -- is --

24 THE COURT: Well, let me run through this -- let
25 me get through this for our courtroom deputy.

1 MR. LEOPOLD: Okay.

2 THE COURT: Docket entry 20, the motion for
3 leave to file second supplemental material in the Dew case
4 is granted. That's the materials the defense submitted.

5 The motion for a status conference, docket entry 24,
6 is granted. That's why we're here.

7 And then the third motion for leave to submit
8 supplemental material, that motion is granted.

9 So, now let's talk about other housekeeping matters,
10 to include the Dew case.

11 MR. LEOPOLD: Right. My understanding, and
12 Baron & Budd's counsel can address it, but there are
13 approximately an additional complaint of homeowners in and
14 around the facility that have contaminated wells that the
15 Baron & Budd firm represent. I understand that there may
16 be an additional 25 to 30 additional families in and around
17 that area where additional complaints may be filed.

18 And I guess the question is would the Court prefer to
19 have those consolidated into the master complaint and a
20 short form complaint filed, or just separate individual
21 complaints filed and then later consolidated so that the
22 defendants can appropriately respond to those?

23 I'm just not sure how the Court wishes, from a
24 housekeeping matter, because I can see that it can get
25 convoluted.

1 THE COURT: Right. How about from the defense
2 perspective on that?

3 MR. SHERK: Your Honor, John Sherk.

4 THE COURT: Uh-huh.

5 MR. SHERK: We very much prefer that, if new
6 plaintiffs are added, they're added with an amended
7 complaint or that the parties are joined according to Rule
8 15 or Rule 20.

9 We see a lot of mischief, problems and confusion if
10 we have a willy-nilly, truncated, short-cut procedure to
11 try to add parties. Now we're down the road. We're not
12 saying they can't add parties. We're just saying that we
13 need to follow the rules.

14 THE COURT: Uh-huh. Right. And I think
15 Mr. Leopold recognizes that. It's just a matter of -- is
16 it something sufficiently different that your clients can't
17 all be in the master complaint of the -- of what I'll call
18 the Nix case?

19 I mean, to me, we have sort of the individual
20 homeowners and the nonutilities. We have utilities, and
21 then we have the nonutilities.

22 MR. SHERK: Well, we do view this as different.
23 Nix, of course, is a class group of plaintiffs. So, these
24 are individuals who are asserting their own property claims
25 that do not desire to be a part of the class. So, they do

1 want to proceed on an individual basis.

2 And what we're trying to do is avoid a constant
3 carousel of new complaints, new motions to dismiss, etc.,
4 trying to do something to unburden the Court as much as
5 possible.

6 THE COURT: Okay, so you want to keep your folks
7 separate, is what you're saying, is what I hear?

8 MR. SHERK: Yes, your Honor. And again, your
9 Honor, we have no problem with them filing another series
10 of complaint or complaints. We'll figure that out. We
11 just don't want a new-fangled process that we're not sure
12 how to respond to.

13 THE COURT: No, no, I totally agree. I mean, I
14 totally get that. And we're going to do our very best to
15 follow the rules.

16 So, you've answered my question, and I'm not going to
17 make you join Mr. Leopold's case if you don't want to join
18 it. But it's just helpful for me to know that we now have
19 the three cases.

20 MR. JOHNSTON: Does your Honor have a preference
21 on how you want us to amend the current Dew plaintiff's
22 complaint, which is currently subject to a motion to
23 dismiss that's been filed by defendants? Our response is
24 due next Wednesday on that.

25 Again, your Honor, we're just trying to prevent the

1 Court --

2 THE COURT: Right.

3 MR. JOHNSTON: -- from having to rule on
4 multiple motions to dismiss.

5 THE COURT: Do you anticipate filing a motion --
6 I mean an amended complaint for your clients?

7 MR. JOHNSTON: I'm sorry?

8 THE COURT: For your clients? Is that what you
9 anticipate?

10 MR. JOHNSTON: We do anticipate filing another
11 20 to 25 plaintiffs in the very near future, and we do
12 believe there will be additional plaintiffs on down the
13 road that we'll seek to file.

14 THE COURT: But are the -- do you anticipate --
15 but are the core claims going to stay the same in terms
16 of --

17 MR. JOHNSTON: Yes.

18 THE COURT: Okay.

19 MR. JOHNSTON: Essentially just adding new
20 plaintiffs to the existing cause of action.

21 THE COURT: Well, it would be most efficient if
22 you all -- if you got them -- for you to amend. And so,
23 then we can -- and then -- and then, once you do that, just
24 get issues in response. And I'd expect you all to just
25 meet and, you know, to talk.

1 I mean, if the defense told me we think this is
2 somehow different and it's kind of mooted our initial
3 motion to dismiss -- because that's sort of a standard
4 fare. I mean, in the world post-*Iqbal* and *Twombly*, it's
5 not an uncommon thing, as everyone here knows, where
6 somebody to file a motion to dismiss and then somebody to
7 amend the complaint. And, at least I know the way I'd do
8 it is, well, this is a new playing field, and so, I'm not
9 going to rule on a motion to dismiss the complaint that's
10 not the operative complaint now. And I'm going to let
11 everybody be heard who wants to say something about
12 whatever the new complaint is.

13 So, do think you can -- and I'm happy to -- you just
14 need to submit, you know, a consent order or a consent
15 motion of some kind, if you anticipate submitting an
16 amended complaint, you know, to let defense counsel know
17 what you're doing to do. I don't -- it's tremendously
18 inefficient for you to respond to theirs or for them to
19 reply if everybody knows it's not going to be the operative
20 complaint.

21 So, I would ask you to confer with defense counsel.
22 I think, you know, Mr. Sherk is right that we don't want to
23 not know what we're doing here in terms of the process.

24 MR. JOHNSTON: We'll meet and confer with
25 defendants, your Honor --

1 THE COURT: Okay.

2 MR. JOHNSTON: -- and figure something out.

3 Thank you.

4 THE COURT: Okay. Okay. Are there any other
5 issues?

6 MR. LEOPOLD: Your Honor, the other issue -- no
7 need to get into the historical issues about whether the
8 Court wanted us to meet and confer on the Rule 26(f)
9 meeting and things of that sort.

10 THE COURT: Right.

11 MR. LEOPOLD: Just in terms of what the Court
12 would like us to do at this point. The Court has not ruled
13 on the dispositive motions.

14 THE COURT: Right.

15 MR. LEOPOLD: That being said, there's a lot
16 that's going on.

17 THE COURT: Right.

18 MR. LEOPOLD: A lot that we'd like to, you know,
19 go on. We have met in person, and it ended up being,
20 instead of an actual meeting, sort of a get-together with a
21 nice lunch and talk about various issues with the hopes of
22 what we'd want to include. We've given a draft case
23 management order, if you will.

24 And, from our standpoint, we'd like to get started
25 appropriately, you know, with requests for production and

1 things of that sort. I don't think it's tantamount that
2 the Court have to rule on the motion to dismiss at this
3 point in time.

4 THE COURT: Right.

5 MR. LEOPOLD: For us to at least meet and get a
6 case management order to your Honor. But I think there may
7 be some confusion on both sides as to what the local rule
8 is on the status of that.

9 THE COURT: Right.

10 MR. LEOPOLD: So, pending the Court's --

11 THE COURT: Sure.

12 MR. LEOPOLD: -- interest on how it would like
13 us to proceed, I guess, leave this limbo, whether we should
14 meet and get the Court case management --

15 THE COURT: Well, and again -- well, I'll hear
16 from defense counsel.

17 MR. SHERK: Thank you, your Honor. We have
18 oodles of respect for Mr. Leopold, but we don't agree here.

19 We think we've filed serious motions to dismiss, your
20 Honor, and there are critical issues that, if the Court
21 decided in our favor, could really narrow the issues --

22 THE COURT: Right.

23 MR. SHERK: -- to be considered and end the
24 scope of discovery. And so, we feel very strongly that we
25 should await the Court's rulings before having a Rule 26

1 conference.

2 Let me give you an example. We have the Cary case.
3 It's an enormous case; hundreds of thousands of people, I
4 think, Mr. Leopold said. It involves claims of personal
5 injuries, for example that -- honestly, I've been a class
6 action defense practitioner for a couple decades. I
7 thought the sun had set on those kinds of personal-injury-
8 based class actions. But we have one here. And there a
9 lot of disease end-points that he's raised in that -- in
10 the context of that case, and he's identified specific
11 diseases that the class representatives are now suffering
12 from.

13 We'd moved to dismiss those components of the case,
14 saying that the allegations are not specific as to
15 causation, for example. And I'm not here to argue the
16 motions --

17 THE COURT: No, I know.

18 MR. SHERK: -- I'm just being illustrative.

19 We said that in the complaint they say that the
20 diseases, for example, are typical of exposure to GenX. We
21 don't think that's enough. Now, if the Court were to rule
22 in our favor on that issue, a wide chunk of that case would
23 go by the wayside and we wouldn't do discovery on that. We
24 think that's an important example.

25 By the same token, in the Cary case, there's a

1 medical monitoring claim. Now, I've handled medical
2 monitoring claims for the last 15, 20 years, and they can
3 be enormous. But we've moved to dismiss that claim, saying
4 that North Carolina doesn't recognize medical monitoring as
5 a cause of action or an element of damage. If the Court
6 rules in our favor on that, by the same token, it will
7 narrow the issues.

8 An example from the Dew case, we've got 68
9 plaintiffs, maybe 20 more to be added. That's a lot. But
10 we've made the point that only Mr. and Mrs. Dew have
11 actually specifically alleged an amount of GenX on their
12 property. As to the rest of the plaintiffs, we don't have
13 any idea if they have GenX, and, if so, how much.

14 There's also, in our view, no allegations of specific
15 damage to property related to GenX. So, we said that's not
16 good enough in our papers.

17 If the Court were to rule in our favor with regard to
18 the Dew case there, we'd go from 68 plaintiffs to two; a
19 dramatic decrease in the issues to be confronted in the
20 scope of discovery.

21 So, that's just a couple of examples, your Honor,
22 real-world examples of how we think it's important that the
23 Court decide those issues before we go rushing into a Rule
24 26 conference.

25 MR. LEOPOLD: And I certainly can appreciate

1 that, but I think, on the broader scale, a meet-and-confer
2 can address all of those issues, where we could have more
3 global issues that, depending on how the Court rules --
4 some may be taken away. But there are core issues that --
5 I think, everybody agrees the case is going to move forward
6 in some fashion. That we're not waiting I don't know how
7 many months before amended complaints and 65 other people
8 come into play, and all these things are teed up. That's
9 essentially what they're arguing.

10 And there's no reason why we can't get together and
11 try and thread the needle on things we know are
12 appropriate. Initial requests that, I think, we can agree
13 on, that -- you know, test results and things they've done
14 in the past, historical documents, preservation issues.
15 All of those things that are standard 101 case-management
16 issues, which, to date, they have, respectfully -- and
17 they're entitled to do so -- refused to even address.
18 Refused.

19 And, so, I don't see any down side on getting
20 together, trying to work those things out, and begin the
21 process. It's going to be slow as it is, but, you know,
22 computer searches, ESI issues, getting -- you know, finding
23 out the stake-holders of what documents to get, the groups
24 and categories of documents that, regardless of who's in
25 the case in the claims, we know are going to be areas of

1 inquiry and production. And that's -- that's what I don't
2 see why we have to wait three, six, literally nine months
3 down the road to begin that process.

4 MR. SHERK: Well, your Honor, if I could make
5 just one point?

6 THE COURT: Sure.

7 MR. SHERK: My partner, Mr. Reilly, talked about
8 the ham in the sandwich earlier this morning. And if
9 there's a motion to dismiss argument out there, I'd call it
10 the big enchilada. It's the primary jurisdiction argument
11 that we made.

12 If the Court were to look favorably on that component
13 of the motion to dismiss, it would literally stay these
14 cases pending some regulatory activity and decision-making.
15 And so, that is another very important issue that this
16 Court ought to take into account before we surge ahead.

17 I think that, you know, once we get the rulings of
18 the Court, we'll move expeditiously. We'll be prepared to
19 do so. And that's the appropriate time to get together and
20 begin.

21 THE COURT: All right. Any other issues?

22 MR. LEOPOLD: No, your Honor, other than, as the
23 Court is, I believe, aware, the issues are teed up.

24 THE COURT: Right.

25 MR. LEOPOLD: I mean, everything is briefed,

1 so --

2 THE COURT: Right.

3 So, I don't know if the Court is going to ask
4 for oral argument or just rule on the papers. That I don't
5 know the answer to. How the Court usually handles that,
6 I'm not sure.

7 THE COURT: It depends. The safest answer ever
8 since law school; right? Cold call. It depends. I need
9 more facts.

10 MR. LEOPOLD: Really, what ties into that issue
11 is we have addressed preservation issues. You know, I have
12 heard all the arguments over the years, and the courts have
13 gone either way. You know, basically, look, the
14 defendants, you're under an obligation under the rules to
15 preserve, and if you don't, you'd suffer the consequences.

16 We'd just like, other than the confirmation of,
17 quote, we're doing what we are supposed to do, which is
18 what we've heard, which we understand; but there's a lot of
19 history here by way of documents and testing, and things of
20 that sort. We would just like some affirmative
21 appreciation of preservation -- what's gone on, how it's
22 being done -- because I think that's important.

23 And, thirdly, the last issue, and however the Court
24 wishes, I had raised this at the January hearing, and this
25 hearing status conference is greatly appreciated. I just

1 think, if we were to have -- whether the Court wants us to
2 notice it, but a regular conference maybe every five, six
3 weeks -- maybe in the middle of July -- just to keep the
4 trains running. I just think it would be very helpful.

5 Today has been very helpful, I know. I'm sure I
6 speak on behalf of both sides. It's very helpful for the
7 parties just to keep this -- you know, this moving. This
8 is, it goes without saying, an important public issue, and
9 we all are getting a lot of inquiries about what is going
10 on. And it just may be helpful.

11 THE COURT: All right. Well, why don't you all,
12 at least on that latter point --

13 MR. REILLY: Your Honor, if you will allow me to
14 address that?

15 THE COURT: Sure.

16 MR. REILLY: This inquiry into -- I've gotten
17 multiple emails asking me to affirm that we are doing what
18 they think we need to do in terms of --

19 THE COURT: Oh, on that issue, let me just say
20 it is not my habit to order people to follow the law. And
21 that goes for everyone in this room. And I know that all
22 of you -- again, it's testified to by all the documents
23 that you all so thoroughly went through in the
24 meet-and-confer, and your professionalism is appreciated
25 and expected.

1 And I meant to tell you all at the beginning, in the
2 well of the courtroom here -- I know we're in this small
3 courtroom today because we're having some maintenance done
4 on 1 -- but you're not visitors here, so you never have to
5 wear a visitor's badge in the well of this courtroom. Now,
6 the CSOs will get after you if you're out in the hallways
7 without one in the federal building, but, in the well of
8 the courtroom, none of the lawyers here are visitors.

9 And so, you don't even have to say what I think you
10 were about to say. I know you know, and I know the
11 plaintiffs know. I mean, I know everyone knows their
12 responsibilities.

13 I will look, on the issue of the meet-and-confer --
14 obviously, under the rules, the parties, if they wanted to,
15 you know, reach agreements, even if they're tentative on
16 certain issues. If you all can do that. I mean, if you
17 don't want to, you don't have to. I'm not sure whether
18 I'll have a hearing or hearings on the motions to dismiss.
19 They raise interesting issues. So, I won't schedule a
20 status conference yet, but as I continue to work on the
21 case, I would expect that to be part of what we do.

22 And, certainly, in this type of case, it's been my
23 practice -- and, again, I have a lot of criminal cases, I
24 can tell you. I finished a trial a couple days ago and
25 start another one soon -- to, once a case gets into

1 discovery, to try and have the availability, at least, of a
2 magistrate judge, or me, depending on schedules, on a
3 monthly basis just to basically -- or sooner. And
4 sometimes things can be done by telephone, just because I
5 know the reality of this type of litigation everybody wants
6 to get the answer they want, but a lot of times they just
7 need an answer so they can keep moving. And we'll
8 certainly do our best to make that happen for you all.

9 Anything else?

10 (Negative replies.)

11 Again, I do want to thank all the lawyers for all
12 their hard work in connection with this. I will get an
13 order out by the end of the day memorializing what I've
14 decided, and I hope everyone has a wonderful Memorial Day
15 weekend.

16 (Whereupon the proceedings concluded at 12:46 p.m.)

17 * * *

18 **CERTIFICATION**

19 I certify that the foregoing is a correct transcript
20 of the record of proceedings in the above-entitled matter
21 to the best of my skill and ability.

22
23 /s/ Harold M. Hagopian
24 Contract Court Reporter

June 7, 2018
Date